PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BRANDY WILSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is payable to the "prevailing party" rather than to the prevailing party's attorney, and therefore is subject to an offset for a pre-existing child-support debt owed by the prevailing party.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The orders of the court of appeals (App., *infra*, 1a-2a, 3a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2008. A petition for rehearing was denied on December 15, 2008 (App., *infra*, 5a). On February 23, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 6, 2009. On March 26, 2009, Justice Alito further

extended the time to May 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, to enable "certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA authorizes the court in a civil action to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" if the position of the United States is not substantially justified and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The applicant for a fee award must therefore demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the action was filed did not exceed $2 million or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party." 28 U.S.C. 2412(d)(1)(B).

b. The Department of the Treasury, through the Financial Management Service (FMS), operates a cen-

tralized delinquent debt collection program known as the Treasury Offset Program. When a federal agency requests that Treasury pay a government obligation, the offset program compares the payee's name and taxpayer identifying number to the names and taxpayer identifying numbers on delinquent debts that federal and state agencies have certified to Treasury as valid, delinquent, and legally enforceable. If the payee is matched to such a debt, the government's payment may be reduced to satisfy the debt pursuant to pertinent authority. See generally, *e.g.*, 5 U.S.C. 5514 (reductions from federal salary); 26 U.S.C. 6331 (levy for federal tax debts), 6402(c)-(e) (reductions from tax refunds); 31 U.S.C. 3716 (administrative offset for non-tax debts), 3720A (reductions from tax refunds); 26 C.F.R. 301.6331-1 (tax levy); 31 C.F.R. 285.1-285.8 (offset regulations).* In January 2005, FMS extended its offset program to so-called "miscellaneous" payments, which include government payments for EAJA awards.

2. Respondent sought judicial review of the denial of her application for Social Security benefits. After losing in the district court, respondent prevailed on appeal. *Wilson* v. *Astrue*, 493 F.3d 965 (8th Cir. 2007). The court of appeals directed that her case be remanded to the Commissioner for further proceedings. *Id.* at 968. Respondent subsequently filed a motion in the court of appeals under EAJA for an award of $4599 in appellate

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* The United States also may exercise a common-law right to reduce its payment by offset for a debt owed to it by a payee. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'") (citation omitted); 31 U.S.C. 3716(d); cf. *Citizens Bank* v. *Strumpf*, 516 U.S. 16, 18 (1995) (discussing offset).

attorney fees and other expenses. On October 1, 2007, the court of appeals granted her unopposed motion and directed that the EAJA fee award be included as part of the court's mandate. See App., *infra*, 3a-4a.

The Commissioner requested Treasury to pay the EAJA award to respondent, and FMS thereupon matched respondent to a certified delinquent child-support debt. Cf. Resp. Mot. to Enforce Mandate, Exh. 1 (filed Nov. 15, 2007). On October 29, 2007, FMS mailed respondent a notice explaining that her creditor agency had previously mailed to her a separate notice explaining the amount and type of debt that she owed, her rights associated with that debt, and the agency's intent to collect the debt by intercepting future federal payments to her. *Ibid.* The notice from FMS further explained that respondent's $4599 EAJA award had been offset in its entirety to satisfy that pre-existing debt. *Ibid.*; see 31 U.S.C. 3701(b)(2), 3716(c); 31 C.F.R. 285.1.

3. Respondent subsequently requested that the court of appeals enforce its mandate by directing the Commissioner to pay the EAJA award directly to respondent's counsel. The motion argued that fee awards under EAJA are payable to counsel for the prevailing party, rather than to the prevailing party herself. Because respondent's motion presented the same question as in *Ratliff* v. *Astrue*, 540 F.3d 800 (8th Cir. 2008), petition for cert. pending, No. 08-1322 (filed Apr. 28, 2009), the court consolidated the cases for oral argument. See App., *infra*, 1a.

On September 5, 2009, the court of appeals held in *Ratliff* that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the claimant's debt." 540 F.3d at 802. Ten days later, the court of appeals issued an un-

published order granting respondent's motion to enforce the mandate. App., *infra*, 1a-2a. The order explained that the court had "issued its decision in the companion case" of *Ratliff* v. *Astrue*, and, "[f]or the reasons stated in that opinion, th[e] court has determined [that] the [EAJA] fees are property of the attorneys and should not be offset against debts owed by the successful claimant." *Id.* at 2a. The order further directed that the EAJA award "should be paid directly to [respondent's counsel]." *Ibid.*

On December 5, 2009, the court of appeals denied rehearing en banc in *Ratliff* with five of the court's 11 active judges voting in favor of en banc review. Ten days later, the court of appeals denied rehearing en banc in the present case with five judges again voting in favor of en banc review. App., *infra*, 5a.

4. On April 28, 2009, the Solicitor General, on behalf of the Commissioner, petitioned this Court for a writ of certiorari to review the judgment of the court of appeals in *Ratliff*.

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals held that awards of EAJA fees and other expenses are the property of, and are payable directly to, the attorneys for a prevailing party. App., *infra*, 2a. The court further held that because the fee award in this case was payable to respondent's attorneys rather than to respondent herself, the award was not subject to offset to collect a pre-existing child-support debt owed by respondent. See *ibid.* The court relied on its decision in *Ratliff* v. *Astrue*, 540 F.3d 800 (8th Cir. 2008), from which the government has petitioned this Court for a writ of certiorari (No. 08-1322). See App., *infra*, 2a. Because this case presents the same

question as *Ratliff*, and because the court of appeals concluded that its prior decision in *Ratliff* resolved the present case, the petition for a writ of certiorari in this case should be held pending the Court's disposition of the petition in *Ratliff* and, if the court grants that petition, pending the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Astrue* v. *Ratliff*, No. 08-1322 (filed Apr. 28, 2009), and then disposed of as appropriate.

Respectfully submitted.

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APRIL 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3627

BRANDY WILSON, PLAINTIFF-APPELLANT

v.

MICHAEL J. ASTRUE, COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of Arkansas

[Sept. 15, 2008]

ORDER

The post-appeal proceedings in this case were consolidated with an appeal in *Catherine Ratliff v. Michael J. Astrue*, 07-2317. Both appeals raise the same issue, that is, whether fees awarded under the Equal Access To Justice Act, 28 U.S.C. § 2412 (EAJA), are property of the successful claimant which can be offset against debts owed by the claimant to the government, or property of the attorney.

In this case, The Bartels Law Firm, LLC, and E. Gregory Wallace, Esq., successfully represented Brandy Wilson in an appeal from a denial of Social Secu-

rity disability benefits. After reversing the Commissioner's denial of Social Security disability benefits, this court awarded attorneys' fees and expenses under the EAJA in the amount of $4598.80. This court's mandate was amended to include the award of EAJA fees. However, due to an outstanding child support obligation, the United States Treasury offset the fee award against the child support debt resulting in no payment to the plaintiff or her attorneys.

The attorneys for the successful claimant then filed a motion to enforce the mandate. As indicated, the essential issue in the motion to enforce the mandate is whether the fees are owned by the claimant or the attorneys who represented the claimant. This court has now issued its decision in the companion case of *Catherine Ratliff v. Michael J. Astrue*, No. 07-2317, filed September 5. [*sic*] 2008. For the reasons stated in that opinion, this court has determined the fees are property of the attorneys and should not be offset against debts owed by the successful claimant.

Accordingly,

IT IS ORDERED the motion to enforce the mandate is granted. The previously granted award of fees under the Equal Access To Justice Act should be paid directly to The Bartels Law Firm for distribution to The Bartels Law Firm and attorney E. Gregory Wallace, Esq.

September 15, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

_____

Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3627

BRANDY WILSON, APPELLANT

v.

MICHAEL J. ASTRUE, APPELLEE

Appeal from the United States District Court
for the Eastern District of Arkansas - Jonesboro
3:05-cv-00187-HLJ

[Filed: Oct. 1, 2007]

ORDER

Appellant's amended motion for attorney's fees and expenses under the Equal Access to Justice Act has been considered by the court and is granted.

Appellant shall recover from appellee fees in the amount of $4,099.35 (Four thousand ninety-nine dollars and thirty-five cents) and expenses in the amount of $499.45 (Four hundred ninety-nine dollars and forty-five cents).

The Clerk of the United States District Court is directed to place these fees and expenses in the previously issued mandate.

October 01, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3627

BRANDY WILSON, APPELLANT

v.

MICHAEL J. ASTRUE, APPELLEE

Appeal from the United States District Court
for the Eastern District of Arkansas - Jonesboro
3:05-cv-00187-HLJ

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Riley, Judge Colloton, Judge Gruender and Judge Benton would grant the petition for rehearing en banc.

December 15, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUL 29 2009
OFFICE OF THE CLERK

No. 08-1335

In The Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

BRANDY WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether the federal government may use an attorney fee awarded under the Equal Access to Justice Act (EAJA) in an *in forma pauperis* Social Security disability case to offset the plaintiff's unrelated debts, thereby nullifying the effect of the EAJA by ensuring that the awarded fee never reaches the plaintiff's attorney.

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INTRODUCTION

This case involves whether Brandy Wilson and her attorneys were wrongly deprived of attorney fees and other expenses in the amount of $4599 awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), when the government offset the entire amount of the EAJA award against Ms. Wilson's old child support debt. Ms. Wilson had successfully challenged the Commissioner's denial of her claim for Supplemental Security Income (SSI) in the United States Court of Appeals for the Eighth Circuit. After the government retained the EAJA award, the Eighth Circuit, in an unpublished order, directed the Commissioner to pay the awarded fees and expenses to Ms. Wilson's attorneys. The court relied on its earlier decision in *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir.), *petition for cert. pending*, No. 08-1322 (filed Apr. 28, 2009), which held that EAJA fee awards become the property of prevailing party's attorneys when assessed and may not be used to offset the party's unrelated debts. The Solicitor General has asked the Court that the petition in this case be held pending the Court's disposition of the petition for certiorari in *Ratliff* and, if the Court grants that petition, pending the Court's decision in *Ratliff*.

For the reasons stated in the brief in opposition to the petition for certiorari in *Ratliff*, the Court should deny the government's petition in that case. If the Court denies the petition in *Ratliff*, it also should deny the petition in Ms. Wilson's case. This case is a poor vehicle for resolving the question presented.

First, the decision below relies solely on *Ratliff* as its basis, offers no discussion of the issues involved, and is an unpublished order that has no precedential effect in the Eighth Circuit or in any other court. Second, review by this Court is premature. The Court already has denied a petition for certiorari in a similar case from the Eleventh Circuit after *Ratliff* was decided, and there has been no significant change in the circuit split since that time. If the Court is inclined to consider the question, other appeals are pending in the Second, Sixth, and Ninth Circuits, which may provide a more thoughtful and thorough analysis of the various issues involved than the Eighth Circuit did in *Ratliff* and *Wilson*. Third, and finally, the decision of the Eighth Circuit was correct on the merits. The EAJA authorizes the award of attorney fees and expenses for the sole purpose of paying the prevailing party's attorney; the award is not the party's to keep or to use for paying other debts. The government's offset policy is inconsistent with the EAJA's text, defeats the statute's remedial purpose, and provides an unintended windfall for clients.

STATEMENT OF THE CASE

1. The Government's EAJA Offset Policy

The origins of this controversy can be traced to the federal government's recently-implemented policy of using attorney fee awards under the EAJA to offset unrelated debts owed to it by the attorney's client.

The government claims authority to seize the fee awards under the Debt Collection Improvement Act of 1996 (DCIA), Pub. L. No. 104-134, Tit. III, ch. 10, § 31001, 110 Stat. 1321-358, and its purported "common law" right to offset. *See* Pet. 3 & n.*. Although the DCIA was enacted in 1996, the government did not begin attempting to offset EAJA fee awards until 2005. *See* Pet. 3. Prior to that time, the government paid attorney fees awarded under the EAJA directly to the attorneys, not their clients. For Social Security disability cases, the Commissioner of Social Security created a direct-deposit system for attorneys and issued I.R.S. 1099 forms to the attorneys designating the fee awards as taxable attorney income. *See Stephens v. Astrue*, 565 F.3d 131, 135 (4th Cir. 2009). The government changed its policy in 2005 and began treating clients who owe the government money as payees of the EAJA fee awards, thereby enabling it to offset the EAJA payments against the clients' debts.

2. The *Wilson* Case and the EAJA Award

The events giving rise to this particular case began when the Commissioner of Social Security denied Brandy Wilson's claim for Supplemental Security Income (SSI)[1] and Wilson successfully challenged that

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[1] The SSI program, created by Title XVI of the Social Security Act, 42 U.S.C. subchapter XVI, is "designed to help aged, blind, and disabled people, who have little or no income" by "provid[ing] cash to meet basic needs for food, clothing, and shelter."

(Continued on following page)

denial in federal court. Ms. Wilson is unable to work due to chronic and severe mental disorders that began when she was a child. She has been diagnosed with major depression with psychotic symptoms, bipolar disorder with mixed psychotic features, posttraumatic stress disorder, and borderline mental retardation. She suffered childhood sexual abuse, attempted suicide four times, and has received mental health care for most of her life. Ms. Wilson made repeated unsuccessful efforts to obtain SSI. Her last claim, which was filed in 2002, was denied by an administrative law judge (ALJ), who concluded that her mental impairments have little effect on her ability to function in the workplace.

After the Social Security Administration's Appeals Council declined to hear Ms. Wilson's appeal, she sought the assistance of Anthony Bartels and the Bartels Law Firm to file suit in the United States District Court for the Eastern District of Arkansas to seek the benefits to which she was entitled. Before Ms. Wilson's complaint was served, she applied for and was granted *in forma pauperis* status under 28 U.S.C. § 1915, which required the district court to determine, based upon an affidavit listing all of Ms. Wilson's assets, that she was financially unable to pay filing fees and other costs of maintaining the suit. *See id.* § 1915(a)(1). The district court subsequently

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Social Security Administration, Supplemental Security Income Home Page, http://www.ssa.gov/ssi/index.htm.

affirmed the Commissioner's decision denying benefits.

Ms. Wilson then appealed her case to the United States Court of Appeals for the Eighth Circuit, where the Commissioner's decision was reversed and the case was remanded for an award of benefits. *See Wilson v. Astrue*, 493 F.3d 965 (8th Cir. 2007). The court of appeals held that the ALJ had improperly discounted the opinions of Ms. Wilson's treating doctors as well as Ms. Wilson's own testimony in describing her limitations to the vocational expert. *Id.* at 967-68. The court of appeals granted Ms. Wilson's unopposed motion for attorney fees under the EAJA in the amount of $4,099.35 for the work of E. Gregory Wallace, a law professor who argued the appeal for the Bartels Law Firm, as well as expenses in the amount of $499.45. The court directed that these amounts be incorporated into its previously issued mandate.

Rather than paying the $4599 EAJA award, the Treasury Department sent Ms. Wilson a notice stating that the entire amount was applied to her child support debt. Because, as the district court had determined, Ms. Wilson was indigent, the effect of the offset was to deprive Prof. Wallace and the Bartels Law Firm of any possibility of payment for their successful work on behalf of Ms. Wilson.

Ms. Wilson subsequently asked the court of appeals to enforce its mandate by directing the Commissioner to pay the EAJA award to her attorneys.

The government argued in response that the attorney fee award belongs to the prevailing party, not the prevailing party's attorney, so the government is entitled to seize the award to pay the party's unrelated debts. Because the case presented the same issue as in *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *petition for cert. pending*, No. 08-1322 (filed Apr. 28, 2009), the court consolidated the cases for oral argument.

On September 5, 2008, the Eighth Circuit issued its decision in *Ratliff*, concluding in a short published opinion that "EAJA fee awards become the property of prevailing party's attorney when assessed and may not be used to offset the claimant's debt." *Id.* at 802. The court explained that its decision was compelled by prior Eighth Circuit precedent – *Curtis v. City of Des Moines*, 995 F.2d 125 (8th Cir. 1993), and *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990). Ten days later, the court of appeals issued an unpublished order granting Ms. Wilson's motion to enforce the mandate. The order stated that "[f]or the reasons stated in [*Ratliff*], th[e] court has determined [that] the [EAJA] fees are property of the attorneys and should not be offset against debts owed by the successful claimant." The court denied the government's petitions for rehearing en banc in *Ratliff* on December 5, 2008, and in Ms. Wilson's case on December 15, 2008.

The Solicitor General, acting on behalf of the Commissioner, filed a petition for a writ of certiorari in *Ratliff* on April 28, 2009. The next day, on April 29,

2009, the Solicitor General filed a petition for a writ of certiorari in this case, asking that the petition be held pending the Court's disposition of the petition in *Ratliff* and, if the Court grants that petition, pending the Court's decision in *Ratliff*.

REASONS FOR DENYING THE PETITION

I. This case is a poor choice for deciding the question presented.

If the Court denies the petition for certiorari in *Ratliff*, it also should deny the petition in this case. Since the disposition below was based solely on *Ratliff*, it would be extraordinary for this case to be a more suitable vehicle for review than *Ratliff*. The government apparently has not even requested that the Court review this case as an alternative to *Ratliff*. The petition for certiorari asks only that it be held (1) until the Court disposes of the petition in *Ratliff*, and (2) if the Court *grants* the petition in *Ratliff*, until the Court decides that case. *See* Pet. 6. In other words, if certiorari is granted in *Ratliff* and the Court reverses that decision, then certiorari should be granted in this case and it also should be reversed. The government says nothing about seeking review of this case if the Court *denies* the petition in *Ratliff*.

Even if the government's petition somehow can be construed as seeking alternative review, this case is a poor choice for deciding the question presented. Beyond its bare reliance on *Ratliff*, the Eighth

Circuit's cursory opinion contains no explanation for why the government may not offset an EAJA fee award to pay the client's unrelated debts, and no consideration is given to issues unique to *Ratliff* that are not present in Ms. Wilson's case (e.g., the attorney's Article III standing). The Eighth Circuit's opinion in *Ratliff* likewise lacks thoughtful discussion of why EAJA fees and other expenses, once awarded, become the property of, and are payable directly to, the attorneys for a prevailing party – it simply invokes prior circuit precedents. Even if the Court is inclined to consider that question, the present case, twice removed from any substantive discussion of the issues, would not be the right one for resolving it.

Additionally, the decision below is an unpublished order that is not even precedent in the Eighth Circuit. "Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent." 8th Cir. R. 32.1A. As such, the order conflicts with no decision of any other court and, thus, cannot by itself create a circuit split or control future decisions in the Eighth Circuit or any other circuit.

II. Review is best deferred until additional courts of appeals have ruled on the question.

The Court already has indicated a reluctance to review the EAJA offset issue by denying the petition for certiorari in *Reeves v. Astrue,* 526 F.3d 732 (11th Cir.), *cert. denied*, 129 S. Ct. 724 (2008), even after

being informed that the Eighth Circuit had denied rehearing en banc in *Ratliff*. The Solicitor General's briefs in opposition to the petitions for certiorari filed in *Reeves* and *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007), *cert. denied*, 129 S. Ct. 486 (2008), argued that any conflict among the circuits might be resolved by the Eighth Circuit granting a rehearing en banc in *Ratliff* and reversing the panel's decision. *See* Brief for the Respondent in Opposition, *Reeves v. Astrue*, No. 08-5605 (filed Nov. 5, 2008); *see also* Brief for the Respondent in Opposition, *Manning v. Astrue*, No. 07-1468 (filed Sept. 26, 2008). The Court denied certiorari in both *Manning* and *Reeves*, and did so in *Reeves* even *after* being notified by the government that the Eighth Circuit had denied rehearing en banc in *Ratliff*. *See* Petition for Writ of Certiorari, *Astrue v. Ratliff* at 15 n.5, No. 08-1322 (filed Apr. 28, 2009). Since the *Reeves* denial, only the Fourth Circuit has weighed in on the question, deciding in *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009), to adopt the government's position. Thus, any developing circuit split has not changed significantly and does not warrant review now any more than it did when the petition in *Reeves* was denied.

The brief in opposition in *Ratliff* lays out nicely the argument for deferral, *see* Brief for the Respondent in Opposition 18-20, *Astrue v. Ratliff*, No. 08-1322 (filed June 29, 2009), so we will only summarize it here. Appeals raising the EAJA offset question are

pending in at least three other circuits – the Second, Sixth, and Ninth[2] – two of which (those in the Second and Ninth) are appeals by the government from detailed and persuasive district court decisions in favor of the right of attorneys in Social Security disability cases to receive EAJA fee awards without offset. The appeal in the Sixth Circuit likely will address an earlier unpublished opinion in that circuit, *King v. Commissioner of Soc. Sec.*, 230 Fed. Appx. 476, 481 (6th Cir. 2007), that also ruled in favor of the attorney. The Court would benefit from the views of these courts before deciding whether it needs to address the EAJA offset question. If one or more of these cases decide that EAJA awards are not subject to offset, there will be further opportunity for the government to seek review by this Court and, in all likelihood, the Court will be presented with a lower court opinion that more thoughtfully and thoroughly discusses the question than the Eighth Circuit did in its cursory rulings in *Ratliff* and *Wilson*. On the other hand, if these courts uniformly decide in favor of offset, the Eighth Circuit's own en banc review process likely will resolve the circuit split.

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[2] *See Thompson v. Astrue*, 2009 WL 537512 (W.D.N.Y. Mar. 3, 2009), *notice of appeal filed* (Apr. 21, 2009); *Bryant v. Astrue*, 2008 WL 4186892 (E.D. Ky. Sept. 10, 2008), *appeal pending*, No. 08-6375 (6th Cir.); *Mahon v. Astrue*, 2008 WL 4183018 (D. Ariz. Sept. 8, 2008), *appeal pending*, No. 09-15873 (9th Cir.).

III. The Eighth Circuit's decision is correct.

The final reason for denying the petition is that the Eighth Circuit was correct in holding that attorneys are entitled to receive EAJA awards without government offset to collect unrelated debts owed by their clients. The EAJA requires that attorney fees and other expenses, once awarded, must be paid to the prevailing party's attorney, whose services provide both the measure and justification for the award. The award is not the party's to keep or to use for paying other debts. The government's contrary policy is inconsistent with the EAJA's text, defeats the statute's remedial purpose, and provides an unintended windfall for clients.[3]

The government's argument turns upon a single phrase that is read without regard to other language in the statute. The EAJA specifies that

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency

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[3] Arguments opposing the government's position on the merits are more fully set forth in the *Ratliff* brief in opposition and in the district court opinions in *Thompson v. Astrue*, 2009 WL 537512, *Quade v. Barnhart*, 570 F. Supp. 2d 1164 (D. Ariz. 2009), and *Williams v. Commissioner of Soc. Sec.*, 549 F. Supp. 2d 613 (D.N.J. 2008).

> action, brought by or against the United States. . . .

28 U.S.C. § 2412(d)(1)(A). Seizing upon the phrase "a court shall award to a prevailing party," the Commissioner generalizes that because the EAJA attorney fee award belongs to the party, not the attorney, the government is entitled to seize the award to pay the party's unrelated debts, even if such action ensures that the fees never reach the party's attorney. The statute never specifically says that, of course – it is merely an inference that the government draws from the prevailing party language. The EAJA does not expressly address whose property the fees become once awarded, or to whom the fees thus awarded should be paid.

What *is* clear from the statutory language is the *single* purpose for which the EAJA award is made: payment of attorney fees and expenses. The award is for "attorney fees" calculated by the attorney's time and hourly rate. 28 U.S.C. § 2412(d)(1)(B) and (d)(2)(A). *See Manning*, 510 F.3d at 1255 (conceding that "it seems counter intuitive to hold that an award of attorney's fees does not go the attorney, especially since the EAJA fees are calculated based on the time spent by the attorney and based on the attorney's hourly rate"). The prevailing party also must have "incurred" those fees in the underlying legal action, 28 U.S.C. § 2412(d)(1)(A); thus, the party is not entitled to the fee award unless obligated to pay those fees to the party's attorney. That is why the litigant who does not hire an attorney but instead proceeds

pro se is not entitled to attorney's fees under the EAJA. *See Kay v. Ehrler*, 499 U.S. 432 (1991); *see also Phillips v. General Servs. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) (explaining that "to be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative. The statute does not contemplate that a fee award may be made to a party to be retained."). The only authorized use of the EAJA attorney fee award is to pay the party's attorney – the statute does not contemplate that a fee award may be made to a party to be kept by the party as income or to be used by the party for other purposes, including payment of personal debts. The statutory language plainly earmarks the fee award for the attorney. Once awarded, the EAJA attorney fees must be paid to the attorney, either directly or through the hands of the prevailing party. Diverting the fee through offset to pay the client's own debts corrupts the payment's purpose and provides an unintended windfall to the client and the client's creditors at the attorney's expense (and, as explained below, at the expense of *future* clients who need the benefit the EAJA provides).

The uncodified savings provision added to the EAJA in the 1985 amendments also calls into question the government's simplistic reading of the statutory language. Attorneys in Social Security cases in federal court may seek attorney fees either under the EAJA or under section 206(b) of the Social Security Act, codified at 42 U.S.C. § 406(b). Fees awarded

under section 206(b) are paid out of the claimant's past-due Social Security benefits. The savings provision describes the relation between the award of attorney's fees under the EAJA and under the Social Security Act. It states that:

> Section 206(b) of the Social Security Act . . . shall not prevent an award of fees and other expenses under section 2412(d) of title 28 [the EAJA]. . . . Section 206(b)(2) of the Social Security Act shall not apply with respect to any such award but only if, where the claimant's attorney receives fees for the same work under both section 206(b) of the Act and section 2412(d) . . . *the claimant's attorney refunds to the claimant* the amount of the smaller fee.

Section 206 of Pub. L. 96-481, as amended by Pub. L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186 (emphasis added). This amendment suggests that Congress understood that the attorney would be the initial recipient of the attorney fee award under the EAJA. If the EAJA attorney fee award belongs to and must be paid to the prevailing party, not the attorney, as the government posits, the amendment would have instructed the party to remit the lesser of the two fees to the attorney, and not vice-versa. At the very least, this reading of the statute shows that the EAJA cannot be read as an unambiguous directive that the EAJA fee award must be paid directly to the Social Security disability claimant, never to the attorney, and that such award may be used to pay the claimant's other debts. Thus, resolving the issue requires

consideration of the EAJA's context, purposes, and history. *See Quade v. Barnhart*, 570 F. Supp. 2d at 1171.[4]

The overarching purpose of the EAJA is best served by rejecting the government's view that EAJA fee awards can be used to offset the client's debts. The EAJA exists to prevent unreasonable government action by providing attorneys to parties who could not otherwise afford them. Congress enacted the EAJA in 1980 in response to its concern that persons "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights." 94 Stat. 2325. Permitting the government to offset EAJA fee awards will resurrect the financial deterrent the EAJA aims to eliminate and defeat the purpose of the statute. There will be little or no

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[4] The government asserts that two cases – *Venegas v. Mitchell*, 495 U.S. 82 (1990), and *Evans v. Jeff D.*, 475 U.S. 717 (1986) – support its position. *See Ratliff* Pet. for Cert. 11-13. Both decisions recognize that the statutory *eligibility* for attorney's fees belongs to the party, not the party's attorney, and thus the party may waive or negotiate that eligibility in settling a case, *see Venegas*, 495 U.S. at 87-88, *Jeff D.*, 475 U.S. at 730, but neither case addresses the question of whether the government can offset attorney fee awards under federal fee-shifting statutes against a party's other debts. As the Eighth Circuit correctly pointed out in *Citizens Legal Environment Action Network, Inc. v. Premium Standard Farms, Inc.*, 397 F.3d 592, 595 n.3 (8th Cir. 2005), "[c]ontrol of negotiations for fees does not imply that the prevailing party is entitled to keep whatever fees are recovered instead of paying the money to the attorney who earned it."

incentive for an attorney to represent an impoverished client against the government when the attorney knows that the government may force him to contribute his or her compensation to pay off the client's personal debts.

This especially is true in Social Security disability cases. Social Security disability claimants typically have no income, face mounting debts, and often confront enormous obstacles in obtaining even the basic necessities of life. Attorney fees for federal court representation are paid in only two ways: from past-due benefits under the Social Security Act, 42 U.S.C. § 406(b)(1), or under the EAJA. Except for attorney fees paid under the EAJA, the Social Security Act, 42 U.S.C. § 406(b)(2), makes it a criminal offense to charge, demand, receive, or collect any attorney fees for federal court representation in excess of the fees awarded from past-due benefits under section 406(b)(1). This means that the typically modest compensation attorneys receive under the EAJA may be the only fees ever paid for federal court litigation involving Social Security disability claimants. The vast majority of Social Security disability cases in federal court in which the claimant prevails are remanded not for an award of benefits, but for further administrative proceedings. There is no assurance that the claimant will receive benefits as a result of those proceedings.

Seizing EAJA attorney fee awards to offset old debts will negate the effect and benefit of the EAJA for impoverished Social Security claimants who have

such debts. Attorneys will attempt to determine prior to agreeing to representation whether claimants owe old tax, food stamp, child-support, or student loan debts, old fines or civil judgments, or other debts to the government. It takes little imagination to conclude that if those debts exist, many attorneys will decline representation, rather than work without expectation of compensation. Other attorneys may conclude that it will be impossible to reliably determine whether disability claimants have such debts and, rather than running the risk of never being paid, may simply refuse to take disability cases. The real harm ultimately will not fall on attorneys, who will find other sources of income, but rather on the needy and destitute, who will not be able to find attorneys willing to take their cases. Offsetting fee awards will have the exact opposite effect intended by the EAJA – attorneys will have less incentive to represent deserving claimants and to hold the government accountable when it acts without substantial justification. *See Quade*, 570 F. Supp. 2d at 1172 (noting the chilling effect on a claimant's ability to obtain representation when there is a great likelihood that an attorney will not be paid for work the attorney performs and collecting cases in which several attorneys already have lost earned fees to the debts of their clients).

By offsetting EAJA awards, the government is following its obligations under one statute (the DCIA) in a way that nullifies its obligations under another (the EAJA). While this may not be the intended

consequence, it nevertheless happens when lawyers are made to pay their clients' debts to the federal government out of their compensation under the EAJA. The very incentive that is essential to the EAJA's operation is eliminated. The practical effect is to create a subclass of persons for whom the EAJA no longer applies.

Congress could have specified that EAJA fee awards are subject to offset under the DCIA, but it didn't. The government's offset policy rests precariously on inferences drawn from the statutory language, but "'repeals by implication are not favored,'" *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). The fact that Congress did not expressly exempt EAJA fee awards from offset under the DCIA is not dispositive. Congress had no reason to see or anticipate the conflict between the two laws because the Commissioner's longstanding practice – since the EAJA's inception in 1980 – was to pay EAJA fee awards directly to attorneys; in fact, the agency set up a direct deposit program for attorneys and sent them I.R.S. 1099 forms indicating that the EAJA awards were income to the attorneys. *See Stephens v. Astrue*, 565 F.3d 131, 135 (4th Cir. 2009).

We thus are left with two statutes, neither of which address the effect of the other. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Mancari*, 417 U.S. at 551. Statutes must be read "to

give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). For indigent Social Security claimants with old government debts who have meritorious cases, the only way to give effect to the benefit Congress intended to provide them under the EAJA is to construe the statutes to protect EAJA fee awards from offset against their debts. Under this construction, the DCIA still has teeth – the claimants' federal debts can be offset against their Social Security disability insurance payments, retirement benefits, or SSI, which properly belong to them. *See* 31 U.S.C. § 3716(c)(3)(A)(i)(I) (permitting administrative offset from benefits paid under Social Security Act); *Lockhart v. United States*, 546 U.S. 142 (2005) (holding that the United States may offset Social Security benefits to collect student loan debt). Additionally, the government still may offset any debts the *attorney* properly owes against the EAJA award.

The Court should decline the government's invitation to review *Ratliff* and, accordingly, *this* case for the purpose of protecting the government fisc at the expense of depriving the impoverished of access to the legal assistance that they desperately need.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

BRANDY WILSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals in this case held that attorney fees awarded under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), cannot be reduced to satisfy a debt owed by the prevailing party because, in the court's view, EAJA fees "are owned by * * * the attorneys who represented [that party]." Pet. App. 2a. The court explained that its decision in *Ratliff* v. *Astrue*, 540 F.3d 800 (8th Cir. 2008), petition for cert. pending, No. 08-1322 (filed Apr. 28, 2009), resolved "the same issue" as is presented in this case. Pet. App. 1a. The court concluded that, "[f]or the reasons stated in [the] opinion" in *Ratliff*, the EAJA award in this case should not have been reduced to satisfy respondent's debt. *Id.* at 2a. Because this petition raises the same issue as the

pending petition in *Ratliff*, it should be held pending the Court's disposition of the *Ratliff* petition.

Respondent does not appear to dispute that, if the petition in *Ratliff* is granted, the petition here should be held pending the Court's disposition of that case. See Br. in Opp. 1, 7 (Opp.). Respondent contends, however, that the Court should deny certiorari in *Ratliff*, and that there is no basis for granting review here if the petition in *Ratliff* is denied.

1. In arguing that the petition in *Ratliff* should be denied, respondent embraces (Opp. 9-10) Ratliff's argument that this Court's review should await further developments in the court of appeals. As explained in the government's reply brief in *Ratliff* (at 5-7), eight courts of appeals have addressed the relevant issues, and an entrenched circuit split has resulted. This Court's review is warranted in this context. Respondent likewise invokes (Opp. 11-19 & n.3) the arguments advanced in the *Ratliff* brief in opposition that the court of appeals' decision is correct. For the reasons stated in the government's reply brief in *Ratliff* (at 9-11), those arguments are without merit.

Unlike Ratliff, respondent attempts (Opp. 15 n.4) to reconcile the Eighth Circuit's rulings here and in *Ratliff* with this Court's decisions in *Evans* v. *Jeff D.*, 475 U.S. 717 (1986), and *Venegas* v. *Mitchell*, 495 U.S. 82 (1990). Respondent correctly observes (Opp. 15 n.4) that neither *Jeff D.* nor *Venegas* presented the question whether an attorney fee award could be offset to collect a pre-existing debt owed by the prevailing party. Those cases establish, however, that the entitlement to a fee award, at least under 42 U.S.C. 1988, belongs to the prevailing party rather than to her attorney. See Pet. at 11-12, *Ratliff*, *supra* (No. 08-1322). That holding casts serious

doubt on the Eighth Circuit's determination that "EAJA attorneys' fees are awarded to prevailing parties' attorneys," Pet. App. at 4a, *Ratliff*, *supra* (No. 08-1322)—a determination that was central to the court's ultimate conclusion that the fee awards in *Ratliff* and in this case were not subject to offset to collect the claimants' pre-existing debts.

Respondent argues (Opp. 15-17) that attorneys will refuse to represent Social Security disability claimants if EAJA award payments are subject to offset to collect the claimants' pre-existing, delinquent debts. That argument lacks merit. As an initial matter, it is not clear to what extent attorneys make representation decisions based on the potential for an EAJA recovery. See *Pierce* v. *Underwood*, 487 U.S. 552, 573-574 (1988) (explaining that "it is quite impossible to base [an economically viable law] practice upon the acceptance of non-monetary cases in which there is fair prospect that the Government's position will not be 'substantially justified'" because a "lawyer will rarely be able to assess with any degree of certainty the likelihood that the Government's position will be deemed so unreasonable as to produce an EAJA award"). But even assuming attorneys make representation decisions based on the prospect of collecting EAJA awards, there is no reason to think that the current majority rule will create a general deterrent to attorneys' representation of disability claimants—and no evidence to suggest it has in fact done so. Lawyers can readily determine whether potential clients owe debts subject to offset. Potential clients receive advance written notice of any debt subject to collection by offset, see 31 U.S.C. 3716(a)(1); 31 C.F.R. 285.1(h)(1), 285.5(d)(6)(ii)(A), and the Department of the Treasury will disclose such information to an attorney if

the potential client provides a signed Privacy Act waiver. And if the client owes a debt subject to offset, the client has the opportunity to seek administrative review of the debt obligation and to agree to a written repayment plan that will prevent an offset from occurring, thus protecting any EAJA recovery from reduction. See 31 U.S.C. 3716(a) (requiring notice of those opportunities); 31 C.F.R. 285.1(h), 285.5(d)(6)(ii)(A).

In any event, the statute is clear and presumably reflects Congress's best judgment about how to accommodate the interests at stake. Congress has directed that federal officials "shall offset" federal payments to collect specified delinquent debts, including "any amount" owed to the United States and past-due child-support obligations enforced by a State, unless those payments are specifically exempted pursuant to statutory authority. 31 U.S.C. 3701(b)(1) and (2), 3716(c)(1)(A); see, *e.g.*, 31 U.S.C. 3701(d), 3716(c)(1)(C) and (3)(B) (exemptions). Congress has not exempted EAJA award payments from offset. Accordingly, because EAJA fees and other expenses are "award[ed] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), they are subject to offset to collect a pre-existing debt owed by that party. The court of appeals erred in holding otherwise.

2. Respondent contends (Opp. 1-2) that, if the Court denies the government's petition for a writ of certiorari in *Ratliff*, it should deny certiorari here as well. If the Court denies the petition in *Ratliff* because it concludes that the question presented is not of sufficient importance to warrant this Court's review, or that the Court's consideration of the relevant issues would benefit from further development of the law in the courts of appeals,

those reasons would apply equally to the petition in this case.

The respondent in *Ratliff* has also argued that several features distinct to that case make it an unsuitable vehicle for resolution of the question presented. See Br. in Opp. at 12-18, *Ratliff*, *supra* (No. 08-1322). For the reasons stated in the government's reply brief in *Ratliff* (at 2-5, 7-9), those arguments lack merit. Nevertheless, if the Court concludes that the question whether EAJA awards are subject to offset to collect prevailing parties' debts warrants review by this Court, but that *Ratliff* is not an appropriate case in which to resolve that issue, the Court should grant plenary review in this case.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending the Court's disposition of *Astrue* v. *Ratliff*, No. 08-1322 (filed Apr. 28, 2009), and then disposed of as appropriate. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

AUGUST 2009

REPLY BRIEF